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No. 93-1037

In The

Supreme Court of the United States

October Term, 1993

JAMIE BELGARD-KRAUSE, JANET SQUIRE, and all persons similarly situated,

Petitioners,

v.

UNITED AIRLINES, a Delaware corporation,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Colorado Court of Appeals commit any error of federal law in holding that application of Colorado's handicap discrimination statute to claims based on pilot qualifications is preempted by federal law?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

APPLICABLE STATUTES 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. PETITIONERS' ARGUMENT WOULD REQUIRE THIS COURT'S REVIEW OF COLORADO STATE LAW 6

II. AS WAS UNDISPUTED BELOW, AND SHOULD BE UNDISPUTED IN THIS COURT, REGULATION OF PILOT QUALIFICATIONS "RELATES TO" AIRLINE SERVICES, AND THEREFORE STATE REGULATION OF AIRLINE PILOT QUALIFICATIONS IS PRECLUDED BY THE EXPRESS PREEMPTION PROVISION OF THE FEDERAL AVIATION ACT 10

III. THE PERVASIVE FEDERAL REGULATION OF THE FIELD OF PILOT QUALIFICATIONS PRECLUDES STATE LEGISLATION IN THAT FIELD 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

STATUTES

49 U.S.C. § 1305(a)(1) 1, 10-18, 21

49 U.S.C. § 1374 1

49 U.S.C. § 1421(b) 2, 4

49 U.S.C. § 1506 13

Colo.Rev.Stat. § 24-34-301(4) 8

Colo.Rev.Stat. § 24-34-402(1)(a) 6, 8

CASES

Buchanan v. Kentucky, 483 U.S. 402 (1987) 11

Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 291, 126 L.Ed.2d 240 (1993) 16, 17

Colorado Anti-Discrimination Commission v. Continental Airlines, 372 U.S. 714 (1963) 14, 15

Colorado Civil Rights Commission v. ConAgraFlour Milling Co., 736 P.2d 842 (Colo. App. 1987) 8

Colorado Civil Rights Commission v. North Washington Fire Protection District, 772 P.2d 70 (Colo. 1989) 8

Federal Express Corp. v. Tennessee Public Service Comm'n, 925 F.2d 962 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 59 (1991) 17

TABLE OF AUTHORITIES – Continued

Page

French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1981) 18, 19

Gamble v. Levits Furniture Co. of the Midwest, Inc., 759 P.2d 761 (Colo. App. 1988) 8

Hastalis v. Illinois Human Rights Comm'n, 205 Ill. App.3d 50, 150 Ill. Dec. 469, 562 N.E.2d 1272 (1990) 18

Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984) 17

Hodges v. Delta Airlines, Inc., 4 F.3d 350 (5th Cir. 1993) 16, 17

Illinois Corporate Travel, Inc. v. American Airlines, Inc., 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990) 17

In re Air Crash Disaster at Stapleton International Airport, 721 F. Supp. 1185 (D. Colo. 1988) 16

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965) 7

Morales v. Transworld Airlines, Inc., 504 U.S. ___, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992) 7, 12-14, 17, 18, 22

Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) ..4, 20

New England Legal Found. v. Massachusetts Port Auth., 883 F.2d 157 (1st Cir. 1989) 17

New York Lake Erie & Western R.R. Co. v. Estill, 147 U.S. 591 (1893) 11

Northwest Airlines v. Minnesota, 322 U.S. 292 (1944) 21

TABLE OF AUTHORITIES – Continued

Page

O'Carroll v. American Airlines, 863 F.2d 11 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989).....10, 16

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 11

Robinson v. American Airlines, Inc., 722 F. Supp. 757 *aff'd*, 908 F.2d 1020 (D.C. Cir. 1990).....4, 20

Silverstein v. Sisters of Charity, 43 Colo. App. 446, 614 P.2d 891 (1979) 8

Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 307 (1990) 17

World Airways, Inc. v. Internat'l Broth. of Teamsters, 578 F.2d 800 (9th Cir. 1978).....4, 20

REGULATIONS

14 C.F.R. Part 382 15

14 C.F.R. § 382.3..... 15

14 C.F.R. § 121.383(a)..... 4

14 C.F.R. § 121.413 4

3 Colo.Reg. 708-1 Rule 60.2 E..... 6

RULES

S. Ct.R. 10..... 22

APPLICABLE STATUTES

49 U.S.C. § 1305. Federal preemption

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. § 1374. Duty of air carrier to provide interstate and overseas air transportation

(a) Through service in connection with other carriers; safe and adequate service, etc.; just and reasonable rates, fares and charges.

(1) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers authorized to engage in scheduled air transportation by certificate or by exemption under section 1386(b)(3) of this title; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish

just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

49 U.S.C. § 1421. Powers and duties of Secretary of Transportation

(b) Consideration of needs of service; classification of standards, rules, regulations, and certificates

In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Secretary of Transportation may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Secretary of Transportation shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this subchapter.

STATEMENT OF THE CASE

Petitioners filed their action, based only on Colorado state handicap discrimination law and not on any federal law, in the District Court for the City and County of Denver. Petitioners contend in their statement of the case that it was "undisputed" that the sole reason why Respondent United Airlines ("United")[1] medically evaluated pilot candidates was "cost-savings." Petition, pp. 6, 7. This is not the case. In fact, United consistently argued that its medical evaluation of pilot candidates was taken because of United's obligations under federal law to maintain safety and independently evaluate pilot candidates.

Petitioners also make a number of other factual assertions which are not based on any evidence in the record in the Colorado courts, including assertions that their vision exceeded federal standards and United's standards, that other United pilots were flying commercial jets despite a history of the same eye surgery, that other airlines did not disqualify pilot candidates who had a history of radial keratotomy surgery, that Petitioners had no side effects "or detectable conditions" from the surgery, and that they met all federal regulatory standards for commercial pilots. Petition, pp. 7-8.

Petitioners also include two legal arguments in their statement of the case. First, Petitioners assert that United employed a pre-employment "genetic" and medical screening of applicants for pilot positions, in violation of Colorado law. Petition, p. 6. As stated in the first section of United's argument, the conclusions of the Colorado Court of Appeals as to Colorado law are binding on this

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[1] The parent corporation of United is UAL Corporation.

Court, and United's practices were not found to be in violation of Colorado law. Further, there is no evidence in the record of any "genetic" testing by United.

Second, Petitioners repeatedly argue that, since they held "Class I medical certificates issued by the FAA," federal law does not permit any further inquiry by United into Petitioners' medical condition. Petition, pp. 6, 8, 9. In fact, federal regulations place upon domestic air carriers such as United an independent obligation to verify the qualifications of pilots, beyond the holding of a medical certificate. 14 C.F.R. § 121.383(a). Airlines are required to independently evaluate personal characteristics of pilot candidates that could affect safety. 14 C.F.R. § 121.413. Airlines have a statutory duty to conduct their operations to "perform their services with the highest possible degree of safety in the public interest. . . . " 49 U.S.C. § 1421(b). Accordingly, FAA medical certification regulations are considered to be "bare minimums" and, the FAA condones and supports airlines in requiring stricter standards than those established by the FAA. *Robinson v. American Airlines, Inc.*, 722 F. Supp. 757, 765, *aff'd*, 908 F.2d 1020 (D.C. Cir. 1990). Stricter standards are encouraged because the safe transportation of passengers is the essence of an air carrier's business. *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). *See also World Airways, Inc. v. Internat'l Broth. of Teamsters*, 578 F.2d 800, 808 (9th Cir. 1978) ("Regulations promulgated pursuant to the Federal Aviation Act establish that it is the *duty of the carrier* to determine the *competency of its pilots* in the interests of public safety . . . ") (emphasis added).

Finally, Petitioners fail to inform this Court that they admitted, through their counsel in oral argument before the Court of Appeals, in response to a direct question from the bench that regulation of pilot qualifications *does* "relate to" airline services. Accordingly, the Colorado Court of Appeals found that application of Colorado's handicap discrimination statute in a way which unarguably related to airline services would result in Colorado regulation of airline services. Accordingly, the Colorado courts affirmed the dismissal of Plaintiff's claims.

SUMMARY OF THE ARGUMENT

It was undisputed before the Colorado courts, and should be undisputed in this Court, that regulation of pilot qualification does, in fact, "relate to" airline services. The Colorado courts, in interpreting their own law, found that application of Colorado's handicap discrimination statutes would, in fact, result in Colorado regulation of airline services. That determination by the Colorado courts cannot be disturbed by this Court. Further, it is clear that Petitioners' state law claims did, in fact, relate to regulation of airline services, and also involved an attempt to inject state regulation into a field occupied by pervasive federal regulation.

State regulation of pilot qualifications would result in multitudinous systems for determining which pilots are qualified, and would inevitably lead to different qualification criteria from state to state. Accordingly, every single state and federal court which has considered the

issue has found that state regulation related to pilot qualifications is not permissible, and Petitioners are unable to cite a single decision from any Court permitting state regulation of pilot qualifications. Since the decision of the Colorado Court of Appeals is in accord with every other decision which has considered the issue, and is also based on the Colorado courts' interpretation of Colorado law, this Court should not grant certiorari in this case.

ARGUMENT

I. PETITIONERS' ARGUMENT WOULD REQUIRE THIS COURT'S REVIEW OF COLORADO STATE LAW.

Petitioners' claims in the District Court for the City and County of Denver were based only on state law; no federal claims were raised. As stated by Petitioners, their claims were based on Colo.Rev.Stat. § 24-34-402 and 3 Colo.Reg. 708-1 Rule 60.2 E.

As stated above, Petitioners admitted in the Colorado Courts that regulation of pilot qualifications does "relate to" airline services. Accordingly, it was left to the Colorado courts to determine whether or not application of the Colorado handicap discrimination statute would result in regulation of pilot qualifications. The Colorado Court of Appeals held that it would, and therefore that application of the Colorado statute would relate to airline services. Petitioner's Appendix, p. 6a.

It is clear that federal law preempts state regulation related to airline rates, routes and services. Here, the

Colorado Courts, in interpreting their own handicap discrimination statute and regulations, found that application of those Colorado handicap discrimination statutes and regulations would in fact result in such state regulation. This determination of Colorado law cannot be reviewed by this Court. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489 (1965). *See also Morales v. Transworld Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031, 119 L.Ed.2d 157, 166 (1992) (this Court should not review contention as to preemption of state law where the State itself would not consider its law applicable). Given the breadth of Colorado handicap discrimination law as interpreted by the Colorado courts, certiorari should not be granted by this Court to review their decision.

Petitioners assert that "the state discrimination statute does not require the hiring of an individual with a handicap who is not qualified for the job." Petition, p. 24. This assertion is not based on Colorado law, as announced by the decision of the Colorado Court of Appeals in this case, and previous decisions of Colorado courts, and in fact Colorado law is not so simplistic. As stated by the Colorado Court of Appeals, Colorado law declares that an employer can be required to hire an "otherwise qualified person," despite that person's handicap, unless there is no "reasonable accommodation" which can be made with regard to that handicap. Petitioners' Appendix, p. 2a. More importantly, Colorado law places on the *employer* the burden of proving "that there is no reasonable accommodation that the employer can make with regard to the handicap, that the handicap actually disqualifies the applicant from the job, and that

the handicap has a significant impact on the job." *Colorado Civil Rights Commission v. North Washington Fire Protection District*, 772 P.2d 70, 76 (Colo. 1989), *citing* Colo.Rev.Stat. § 24-34-402(1)(a); *Gamble v. Levits Furniture Co. of the Midwest, Inc.*, 759 P.2d 761, 765 (Colo. App. 1988); *Colorado Civil Rights Commission v. ConAgraFlour Milling Co.*, 736 P.2d 842, 846 (Colo. App. 1987), and *Silverstein v. Sisters of Charity*, 43 Colo. App. 446, 448, 614 P.2d 891, 893 (1979).

Further, the Colorado courts have also held that the Colorado handicap discrimination statute does not even apply unless the Plaintiff's physical impairment "*substantially* limits one or more of a person's *major* life activities." *North Washington*, 772 P.2d at 77, quoting Colo.Rev.Stat. § 24-34-301(4) (emphasis from *North Washington*). In emphasizing the inclusion of the words "substantially" and "major" in the statute, the Colorado Supreme Court noted that the statute's protections were not available to persons with minor handicaps, but instead requires an impairment which "substantially limits an individual's employment potential." *North Washington*, 772 P.2d at 77.

Accordingly, application of the Colorado handicap discrimination statute to pilots would require Colorado courts to determine, as a matter of Colorado law, whether or not a pilot or group of pilots was sufficiently qualified, despite a handicap which substantially limits the pilot's employment potential. This determination would be made in the context of the employer's burden to prove that the serious handicap does in fact disqualify the applicant from the job, has a serious impact on the job, and no reasonable accommodation can be made. How the

Colorado courts would evaluate the claims of candidates for positions as pilots cannot be predicted. However, it is certain that (1) the inquiry would intimately involve the Colorado courts in passing on pilot qualifications, and (2) Colorado's determination as to which pilots were qualified would inevitably conflict with the determinations of other states. Again, the conclusions of the Colorado courts as to these matters of Colorado law cannot be reviewed by this Court.

Petitioners also assert that "it is undisputed that pre-employment inquiries used to predict if an applicant is genetically predisposed to a future disability, if non-job related, violate Colorado's employment discrimination laws and regulations." Petition, p. 29. In fact, as pointed out by the Colorado Court of Appeals in this matter, "inquiries limited to a job applicant's 'ability to perform job-related functions' are permissible." Petitioner's Appendix, p. 2a. Accordingly, the Colorado courts determined that Petitioners' Colorado handicap discrimination claims would require an examination of the pre-employment inquiry's relation to the ability to perform pilot functions. Once again, this determination of Colorado law leads to the conclusion that application of the Colorado statute to pilots would result in the state passing on pilot qualifications.

II. AS WAS UNDISPUTED BELOW, AND SHOULD BE UNDISPUTED IN THIS COURT, REGULATION OF PILOT QUALIFICATIONS "RELATES TO" AIRLINE SERVICES, AND THEREFORE STATE REGULATION OF AIRLINE PILOT QUALIFICATIONS IS PRECLUDED BY THE EXPRESS PREEMPTION PROVISION OF THE FEDERAL AVIATION ACT.

As Petitioners correctly point out, federal preemption can be found in any one of three different ways: (1) express or implied preemption through a statute intended to preempt state legislation, (2) inferred preemption from pervasive federal regulation in the field, and (3) preemption of state legislation which conflicts with federal legislation. Petition, p. 13. The existence of any one of which is sufficient to find state regulation preempted. *O'Carroll v. American Airlines*, 863 F.2d 11, 12 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989).

49 U.S.C. § 1305(a)(1) states as follows:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Subchapter 4 of this Chapter to provide air transportation,

Petitioners' argument in this Court is based on a contention that the term "services" in the statute does not include pilot qualifications, but instead has a "narrow meaning" including only "the type of operations offered to passengers and not the manner in which they are

provided." Petition, pp. 19, 22. Accordingly, Petitioners' argument depends on their contention that states are free to regulate the "manner" in which airlines provide services.

The first problem with Petitioners' argument is that it conflicts with Petitioners' contentions in the Colorado courts. In fact, in oral argument before the Colorado Court of Appeals, counsel for Petitioners admitted, in response to a direct question from the bench, that regulation of pilot qualifications does, in fact, "relate to" airline services. Having recognized in the Colorado courts that regulation of pilot qualifications "relates to" airline services, Petitioners cannot be permitted to withdraw that concession in this Court. *New York Lake Erie & Western R.R. Co. v. Estill*, 147 U.S. 591, 613 (1893); *Regents of the University of California v. Bakke*, 438 U.S. 265, 283 (1978); *Buchanan v. Kentucky*, 483 U.S. 402, 404 n.1 (1987).

In any event, Petitioners' admission was unavoidable, and 49 U.S.C. § 1305(a)(1) cannot be read to permit any state regulation of airline services so long as it only involves the "manner" in which services are provided as opposed to the "type."

Further, Petitioners' argument also depends upon an argument that the Colorado courts "erred in collapsing two independent inquiries into one." Petition, p. 23. That is, Petitioners argue that the scope of the word "services" in 49 U.S.C. § 1305(a)(1) must be examined without reference to the words "relate to" in the statute, and that simple examination of "the scope of the word 'services' is the key inquiry." Petition, p. 19. Petitioners' argument

simply conflicts with the Court's recent decision interpreting 49 U.S.C. § 1305(a)(1), *Morales v. Transworld Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031, 119 L.Ed.2d 157, 167 (1992), where this Court held that "the key phrase, obviously, is 'relating to' ".

In *Morales*, this Court considered whether state regulation of airline *advertising* constituted impermissible state regulation "related to" airline *rates*. This Court rejected an argument, exactly like that of the Petitioners here, that the state regulation was permissible because it did not regulate airline "rates." "This simply reads the words 'relating to' out of the statute." *Id.*, 119 L.Ed.2d at 168. In holding that regulation of airline advertisement necessarily "relates to" airline rates, this Court noted that (1) the expenses involved in operating an airline flight are almost always fixed, (2) the market for airline services is divided between consumers who are, and those who are not, affected by price, (3) airlines must therefore attempt to sell as many seats as possible to those who will pay higher prices, (4) airlines must therefore place restrictions on the number of inexpensive seats, and (5) state requirements to disclose these restrictions in advertising would require airlines to put too much information in their advertising. *Id.*, 119 L.Ed.2d at 157. Accordingly, the Court held that state regulation of airline advertising necessarily affects airline rates, and therefore "related to" airline rates.

The relationship between pilot qualifications and airline "services" present here is far less attenuated then the relationship between airline advertising and airline "rates" in *Morales*. Airlines could not provide services without qualified pilots, and could not provide those

services safely without the highest qualified pilots. More importantly, airline services would definitely be disrupted if each state had its own system for determining which pilots were qualified, resulting in pilots being qualified in some states and not others, and requiring pilot changes when planes cross state lines.

Petitioners also argue that the "savings clause" adopted with the original FAA in 1958, 49 U.S.C. § 1506, "shows the lack of Congressional intent to regulate all activities involving airlines." Petition, p. 22. This is another argument this Court disposed of in *Morales*, where the Court held that the specific preemption provision of 49 U.S.C. § 1305(a)(1) controls over that general provision, particularly "where the 'saving' clause is a relic of the pre-ADA/no pre-emption regime." *Id.*, 119 L.Ed.2d at 168.

Petitioners argue that application of the Colorado handicap discrimination statute cannot be found to be preempted by 49 U.S.C. § 1305(a)(1), because "[h]ere, the state employment discrimination statute neither makes 'reference' to 'services,' or relates to 'services.' " Petition, p. 24. Here again, Petitioners' argument was addressed and rejected in *Morales*. There, the Petitioners argued that since the advertising regulations at issue did not specifically address the airline industry, they were not preempted. *Id.*, 119 L.Ed.2d at 169. In response, this Court emphasized that the key phrase of the statute, "relating to," expresses "a broad pre-emptive purpose." Accordingly, the statute preempts "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes or services'. . . . " *Id.*, 119 L.Ed.2d at 167. Accordingly, this Court held that state regulation "relates to"

airline rates, routes and services even if the effect on airlines or their services is indirect. *Id.*, 119 L.Ed.2d at 169.

Petitioners also assert that 49 U.S.C. § 1305(a)(1) cannot be read to preclude state regulation of pilot qualifications, because there is no legislative history for the statute which mentions pilot qualifications, and instead the legislative history refers to "providing air transportation to the flying public from point to point," "*intra*state fares charged by *inter*state airlines," and "utility-type regulation." Petition, pp. 19, 20 (emphasis in original). This argument based on lack of legislative history was once again specifically rejected in *Morales*. *Id*. at 168, n.2.

Petitioners open their argument as to interpretation of 49 U.S.C. § 1305(a)(1) by citing to the decision of this Court in *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714 (1963). Petition, pp. 12-14, 17, 18, 24. This argument is absurd because *Continental* was decided long before 49 U.S.C. § 1305(a)(1) was ever enacted. More importantly, as the Colorado Court of Appeals noted in its Opinion, this Court in *Continental* made it absolutely clear that its holding was limited merely to state statutes which regulate *racial* discrimination:

> Were there a possibility that a pilot hired in Colorado *could* be barred solely because of his *color* from serving a carrier in another state, then this case might well be controlled by our prior holdings (finding state regulation to be an impermissible burden on commerce). But under our most recent decisions *any* state or federal law requiring applicants for any job to be turned

> away because of their *color* would be invalid under the Due Process Clause of the Fifth Amendment. The kind of burden that was thought *possible* in the (prior holdings) therefore, *simply cannot exist* here.

Id., 372 U.S. at 721 (emphasis added). Unlike a pilot's *race*, however, a pilot's alleged *handicap can* affect his or her qualifications. To allow each state to make its own regulations or interpretations as to whether each pilot's handicap sufficiently disqualified him or her would be to allow state regulation of the airline industry, which the express preemption provision of the FAA seeks to avoid. This Court specifically recognized this in *Continental*, and therefore stated that state law regulations which went to qualifications would be an impermissible burden on interstate commerce.

Petitioners also repeatedly cite to Department of Transportation Regulations, but fail to inform the Court that they are actually quoting from regulations for an entirely different, separate act, the Air Carrier Access Act. Petition, pp. 16-17, 24, 26, 27. Petitioners' reliance on the regulations for the Air Carrier Access Act, at 14 C.F.R. Part 382, is an improper method to attempt to interpret the preemptive provision of the Airline Deregulation Act ("ADA"), since those regulations themselves state that "The ACAA . . . is silent with respect to the rights of [airline employees]" and covers only discrimination against passengers. 14 C.F.R. 382.3. It is also improper for Petitioners to continuously cite those regulations in conjunction with the ADA, and even to suggest that the regulations were intended to define the term "services" in 49 U.S.C. § 1305(a)(1), when those regulations do not

apply to the ADA, and explicitly do not apply to airline employees. Contrary to the assertion at pages 16-17 of the Petition, nothing within the ACAA regulations suggests that anything therein was intended to define the term "services" in the FAA preemptive provision; in fact, the regulations explicitly state that the ACAA has nothing to do with the rights of airline employees. It is simply disingenuous for Petitioners to pretend that the ACAA regulations constitute an administrative interpretation of 49 U.S.C. § 1305(a)(1).

Finally, Petitioners rely on cases involving state law personal injury claims arising out of airline accidents, *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993) and *In re Air Crash Disaster at Stapleton International Airport*, 721 F. Supp. 1185 (D. Colo. 1988). Petition, pp. 25, 27. Before the Colorado Supreme Court, Petitioners had relied on *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 291, 126 L.Ed.2d 240 (1993). Such personal injury decisions, by their own terms, do not apply to before-the-fact attempts to regulate pilot qualifications. In *Hodges*, the court held that Congress did not appear to have intended to eliminate personal injury suits, since it continued to require airlines to have insurance. *Id.*, 4 F.3d at 355. The Court held that the term "services" includes "matters . . . appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline," but does not include a later tort suit against the airline.

Accordingly, the Court in *Hodges* cited with approval from *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989) as a case in which federal preemption was clear. In *O'Carroll*, an

allegedly loud and boisterous passenger's discrimination claim for wrongful eviction from the flight was found to be preempted "because the state law claims arising from the alleged wrongful exclusion undeniably related to the services provided by the airline." *Hodges*, 4 F.3d at 356. Of course, the qualifications of pilots relate even more directly to airline services than the loudness or rudeness of passengers, and the Court in *Hodges* therefore clearly would find claims related to pilot qualifications pre-empted. Similarly, *Cleveland* specifically stated that although personal injury claims were not preempted, cases which "address pilot regulation" are properly found to be preempted. *Cleveland*, 985 F.2d at 1443, n.7.

The Colorado Court of Appeals' interpretation of 49 U.S.C. § 1305(a)(1) corresponds to the consistently broad construction given to the preemption provision, not only by *Morales*, but also by every single state or federal court which had considered the issue before *Morales*. *See Federal Express Corp. v. Tennessee Public Service Comm'n*, 925 F.2d 962, 967-68 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 59 (1991), *citing*, *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990), *cert. denied* 111 S. Ct. 307 (1990); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990); and *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989) ("In each case, the court construed the 'relating to' language in section 1305(a)(1) broadly to find state action preempted").

In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984), the Ninth Circuit Court of Appeals concluded that 49 U.S.C. § 1305(a)(1) preempts state laws concerning the treatment of handicapped passengers,

because the state anti-discrimination laws "relat[ed] to" services within the meaning of Section 1305(a)(1). Similarly, in *Hastalis v. Illinois Human Rights Comm'n*, 205 Ill. App.3d 50, 150 Ill. Dec. 469, 562 N.E.2d 1272 (1990) the Court concluded that 49 U.S.C. § 1305(a)(1) preempts application of Illinois' state handicap discrimination law to airline's denial of boarding privileges to blind passengers. All of these decisions rejected the "narrow meaning" which Petitioners attempt to graft onto the word "services," and instead, as required by this Court in *Morales*, gave 49 U.S.C. § 1305(a)(1) the broad meaning obviously required by the statute's clear terms.

If the Colorado courts had, in fact, rejected the state and federal authority set out above, they would have made themselves the first and only Courts to allow state regulation of pilot qualifications. Because the decision of the Colorado courts is in direct accord with all federal and state authority interpreting 49 U.S.C. § 1305(a)(1), certiorari should not be granted.

III. THE PERVASIVE FEDERAL REGULATION OF THE FIELD OF PILOT QUALIFICATIONS PRECLUDES STATE LEGISLATION IN THAT FIELD.

Petitioners correctly note that United also argued in the Colorado courts that the pervasive and comprehensive scheme of federal regulation in pilot qualifications and safety preclude state regulation in that area, and is an independent basis for finding preemption. Petition, pp. 8-9. The Colorado Court of Appeals also correctly relied on the decision in *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1981). Petitioners' Appendix, p. 7a. However,

Petitioners make no response to this argument and this authority in their Petition.

The Court in *French* stated:

> We infer from the Federal Aviation Act an unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law. In our judgment, such an intent is implicit in the pervasiveness of relevant federal regulation, the dominance of the federal interest, and the legislative goal of establishing a single, uniform system of control over air safety. In this case, all flight plans lead to Washington.

Id. at 6-7. As concluded by the Court in *French*, the medical and physical limitations of persons seeking to become commercial airline pilots have a clear and direct effect on air safety. *Id.* at 7. The Court also noted that the intent of the FAA is to have a single uniform system of regulation with regard to air safety:

> In sum, establishment of a single uniform system of regulation in the area of air safety was one of the primary "object[s] sought to be obtained" by passage of the Act. *Schneidewind*, 108 S. Ct. at 1150. We agree with the Second Circuit that: "The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single authority – indeed, in one administrator – the power to frame rules for the safe and efficient use of the nation's airspace." *Airline Pilots Ass'n Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960). *It is hard to imagine an area of regulation that is more closely related to air safety than pilot qualification. And local restrictions on*

> *pilot qualification would make impossible the attainment of the centralized control and uniformity of design so plainly coveted by the Congress.*

Id. at 5 (emphasis added). *See also World Airways, Inc. v. Internat'l Broth. of Teamsters*, 578 F.2d 800, 808 (9th Cir. 1978) ("Regulations promulgated pursuant to the Federal Aviation Act establish that it is the *duty of the carrier* to determine the *competency of its pilots* in the interests of public safety . . . ") (emphasis added).

Petitioners argue, without any authority, that federal concern with a pilot's qualifications is at an end once it has determined that the pilot is eligible for a license. Petition, pp. 6, 8, 9, 29. This argument has also been consistently rejected; FAA medical certification regulations are considered to be "bare minimums" and, the FAA condones and supports airlines in requiring stricter standards than those established by the FAA. *Robinson v. American Airlines, Inc.*, 722 F. Supp. 757, 765, *aff'd*, 908 F.2d 1020 (D.C. Cir. 1990). Stricter standards are encouraged because the safe transportation of passengers is the essence of an air carrier's business. *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

Petitioners contend that they are seeking "individualized consideration of their presumed handicaps as required by Colorado law." Petition, p. 28. However, the balance the courts of Colorado may strike in evaluating Petitioners' qualifications would certainly vary from the balance the courts of other states would strike. This is precisely the rationale which supports federal preemption. The FAA expressly preempts fifty different states

from passing on their own requirements for pilot qualifications; only the *federal* government may regulate pilot qualifications to assure the required amount of safety.

CONCLUSION

As early as 1944, Justice Jackson noted the singularity of federal control over the nation's system of commercial aviation.

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring). Since 1944, exclusive federal control has become more pervasive, and in greater need of protection from state regulation. Thus, the federal government has enacted 49 U.S.C. § 1305(a)(1), to specifically preclude state regulation.

In the Colorado courts, Petitioners admitted that state regulation of pilot qualifications "relates to" airline

services. Further, the Colorado courts determined in examining their own handicap discrimination statutes that applying them to Petitioners' claims would result in state regulation relating to airline services. Petitioners' argument in their petition not only conflicts with their position taken in the Colorado Courts, but also explicitly conflicts on several counts with this Court's recent decision in *Morales v. Transworld Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031, 119 L.Ed.2d 157, 167 (1992). Finally, Petitioners' arguments have been rejected by every federal and state court which has considered the issue, and there is not a single court, anywhere, which has permitted state regulation of pilot qualifications. Thus, Petitioners have not advanced any basis under S. Ct.R. 10 for this Court to exercise its discretion in granting review on writ of certiorari, and the petition should therefore be denied.

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Respectfully submitted,

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